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The Shirts Off Their Backs: Colleges Getting Away with Violating the Right of Publicity

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Introduction

The popularity of college sports in the United States has led to the proliferation of college sports merchandising. The market in items featuring college logos has substantially grown, especially in the last dozen years. Total retail sales of college merchandise reached $2.1 billion in 1993.[1] This figure has grown from $1 billion in 1989,[2] and $250 million in 1984.[3] This revenue means big royalty figures for the colleges, particularly the ones that enjoy success on the playing field.[4]

Today, college merchandising involves more than just sweatshirts and hats bearing a university's name and logo. The universities have begun licensing products that seek to capitalize on the popularity of actual players in addition to the popularity of the schools and their athletic teams. An intriguing trend has been the marketing of replica game jerseys of college teams, featuring the uniform number of a school's star player or players.[5]

Under the current system, the players receive no direct financial benefit from the sale of college merchandise, even those items utilizing their status as star players on their teams. The colleges and the National Collegiate Athletic Association (NCAA), the governing body for college athletics, control the rights to license these products, including the game jerseys. Schools may enjoy the revenue from the sales, but the NCAA limits compensation to the athletes. NCAA rules generally limit compensation to the athlete to a package including the

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1. Michael Hiestand, *Sports Biz*, U.S.A. TODAY, June 9, 1994, at C3.

2. *Id.*

3. Greg Johnson, *Colleges Score Merchandising Touchdown Retail,* L.A. TIMES, Aug. 31, 1993, at D1 (explaining growth of merchandising has led several colleges to set up outlets in shopping centers and malls).

4. For example, the University of North Carolina made almost $500,000 in royalties from souvenir sales after it defeated Michigan to win the 1993 NCAA men's basketball championship. The royalty figure was based on souvenir sales exceeding $35 million. John Lindsay, *Hogs to Reap Rewards—NCAA Title Will Boost Arkansas Souvenir Sales*, COMMERCIAL APPEAL, April 21, 1994, at D1. The University of Nebraska realized $2.18 million in royalties from license and logo fees during the off-season following its national championship during the 1994 season. *See Sports Briefing*, ROCKY MOUNTAIN NEWS, Aug. 24, 1995, at 18B.

5. *See, e.g.*, 1996 ATHLON SPORTS COLLEGE FOOTBALL EDITION 184 (advertisement for "replica" and "game" college football jerseys). Among the jerseys pictured for sale include a Florida jersey with number 7 (the number worn by quarterback Danny Wuerffel) and a Florida State jersey with number 28 (worn by Warrick Dunn). Other jerseys featured numbers worn by former players, including Nebraska #15 (Tommie Frazier), Ohio State #14 (Bobby Hoying), Penn State #10 (Bobby Engram), Michigan #21 (Tim Biakabutuka), and Nebraska #1 (Lawrence Phillips). Incidentally, all five of these players played for their respective schools in 1995.

value of tuition and fees, room and board, and books to attend school; anything more threatens the athlete's amateur status and, thus, his eligibility to compete in college athletics.[6]

This note addresses the unfairness of colleges and universities capitalizing on merchandise specifically designed to identify with the schools' higher-profile athletes.[7] The note suggests that the marketing of these jerseys violates common law and statutory rights to publicity by unjustly enriching colleges and their licensees who commercially exploit the popularity and star value of the athletes. The note then examines possible solutions to the problem, including the allowance of a right of publicity cause of action for the student-athlete, as well as enabling the student-athlete to enjoy payment for the marketing of merchandise bearing his jersey number. This latter solution is accompanied by an analysis of the NCAA's limited compensation rules. Finally, the note suggests another possible solution: the creation of a trust fund for the athletes whereby the proceeds from the marketing of this merchandise can directly benefit them. Due to the NCAA's traditional notions of amateurism and the legitimization by the courts of the NCAA's role in preserving amateur athletics, the trust fund solution may be the most realistic.

I
Defining the Right of Publicity

The right of publicity has been closely connected with the individual right to privacy. In 1960, Dean William Prosser set forth the basic types of torts which may be grouped under the category of invasion of privacy. In setting forth the law of privacy, Prosser suggested that there were distinct causes of action that an individual had, depending on the type of violation of one's person. These causes of action include:

6. *See* Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 210 (1990)(citing NCAA, 1989-90 NCAA MANUAL 136 (1989)).

7. This issue is not an entirely new one. Current Detroit Pistons basketball player Grant Hill, a former player at Duke University, complained in 1993 that the university had been bringing in considerable revenue selling game jerseys with his number 33. Hill, a senior at the university at that time, noted that the jerseys were being sold for $120 each. Laura Bollig, *NABC 'Issues Summit' Notes,* NCAA NEWS, Oct. 25, 1993, at 6.

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[8]

While Prosser grouped the misappropriation of a person's name or likeness under the right to privacy category, this cause of action can more appropriately be characterized under the separate label of "right of publicity." This separate categorization was suggested by Professor Nimmer in a 1954 article,[9] after concluding that the right to privacy doctrine did not protect against the commercial exploitation of one's identity, particularly in the case of a well-known figure.[10]

The inherent inadequacy of an invasion of privacy cause of action was reflected in the 1941 New York case of *Miller v. Madison Square Garden*.[11] In that case, an official program published, without consent, the name and photograph of a well-known figure. The plaintiff sued under the New York privacy statute and proved that the defendant had violated the law by using his name and picture without his permission.[12] However, because the plaintiff freely admitted that he had not suffered any "ridicule or humiliation" as a result of the misappropriation, the court granted him only six cents in damages.[13] While this result was consistent with invasion of privacy law, it was not consistent with what the just result should have been. One commentator observed that, in reality, "the true *commercial* value of plaintiff's identity was worth a great deal more than six cents to the defendant. The old 'privacy' rubric was simply inadequate to cope with what Nimmer called 'publicity value.'"[14]

Quite simply, the right of publicity is designed to protect a person's financial interest.[15] This is distinct from the rest of Prosser's

8. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

9. *See* Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

10. J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1.8 (1989).

11. 28 N.Y.S.2d 811 (1941).

12. MCCARTHY, *supra* note 10, at § 1.8.

13. *Id.*

14. *Id.* (emphasis in original).

15. "It seems sufficiently evident that appropriation is quite a different matter from intrusion, disclosure of private facts, or a false light in the public eye. The interest protected is not so much a mental as a proprietary one." Prosser, *supra* note 8, at 406.

right to privacy torts, which are designed to protect personal interests, such as a person's well-being and the right to be free of negative public discourse.[16] Furthermore, public figures subjected to public exposure and publicity are often not harmed by the attention; to the contrary, they often relish publicity as a chance to further their careers.[17] Publicity, however, is not without its limits. There exists a right of publicity to "own, protect, and profit from the commercial value of one's name, likeness, activities, or identity, and to prevent the unauthorized exploitation of these traits by others."[18]

The earliest case recognizing the right of publicity as a distinct doctrine involved the likenesses of baseball players featured on trading cards. In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,[19] Haelan contracted with a professional ballplayer to gain the exclusive right to use his photograph in connection with the sales of its gum.[20] Haelan alleged that Topps, the defendant, induced the player to give it a similar authorization.[21] The defendant argued that there was no such tortious interference. Topps contended that the breach was induced by an independent third party who obtained the rights from the ballplayer before assigning them to the defendant. With that being the case, there would have been no tortious interference by the defendant.[22] Topps then contended that Haelan's contract with the plaintiff "created [no] more than a release of liability, because a man has *no legal interest* in the publication of his picture other than his right of privacy, *i.e.*, a personal and non-assignable right not to have his feelings hurt by such a publication."[23] The Second Circuit explained that "in addition to and independent of that right to privacy

16. *See* Kenneth E. Spahn, *The Right of Publicity: A Matter of Privacy, Property, or Public Domain?*, 19 NOVA L. REV. 1013, 1025 (1995).

17. *Id.*

18. *Id.* at 1014.

19. 202 F.2d 866 (2d Cir. 1953).

20. *Id.* at 867.

21. The court stated that Topps engaged in tortious interference with contract "[i]f defendant, knowing of the contract, deliberately induced the ball-player to break that promise." *Id.* at 867-68.

22. *Id.* at 868.

23. *Id.* (emphasis added). The defendant argued that Haelan:

> had no right to assert, for "privacy" was only a personal and non-assignable right by a ballplayer not to have his feelings hurt by commercial use on baseball cards . . . all that the ballplayers' contracts consisted of was a release or waiver of the right to sue for an invasion of "privacy"—no more. As a mere holder of a waiver or "settlement," plaintiff could not sue defendant.

MCCARTHY, *supra* note 10, at § 1.7.

(which New York derives from statute), a man has a right in the publicity value of his photograph . . . ."[24] The court went on to recognize the existence of a right of publicity, as well as the privilege to freely assign that right to others.[25]

With the emergence of the *Haelan* decision and the analyses of Nimmer and Prosser, the right of publicity was born. A common law right of publicity was later recognized by the United States Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.*[26] In this case, the plaintiff alleged a right of publicity violation based on material used on an evening newscast. The defendant filmed a segment of the plaintiff's human cannonball stunt act and broadcasted it without permission.[27] The Supreme Court held that the broadcast posed "a substantial threat to the economic value" of the plaintiff's performance.[28] This threat violated his right of publicity and enabled the defendant to benefit by this exploitation.[29] Not only did this case recognize the right of publicity cause of action, it also upheld this right even in light of the "strong countervailing right of the media, guaranteed by both the First Amendment and the Fourteenth Amendment, to report on newsworthy matters in the public interest."[30]

Cases like *Zacchini* recognize that the right of publicity exists by way of judicial decision. While most states recognizing the doctrine have done so through case law, other states have addressed this issue through statutory recognition of the right of publicity.[31]

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24. *Haelan Labs.*, 202 F.2d at 868.

25. *Id.* The court recognized that "it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances . . . ." *Id.*

26. 433 U.S. 562 (1977).

27. *Id.* at 564.

28. *Id.* at 575.

29. "'No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.'" *Id.* at 576 (quoting Harry Kalven Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966)).

30. H. Lee Hetherington, *Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity*, 17 COLUM.-VLA J.L. & ARTS 1, 7 (1992). The United States Supreme Court, in *Zacchini*, overruled the Ohio Supreme Court, which had held that Scripps-Howard Broadcasting was constitutionally privileged. *Zacchini*, 433 U.S. at 569.

31. As of 1992, 13 states had enacted statutes addressing the right of publicity, while 23 others had the right established through judicial decision. Alexander Margolies, *Sports Figures, Right of Publicity*, 1 SPORTS L.J. 359, 360-61 (1994). By 1995, 14 states had right of publicity statutes: California, Florida, Georgia, Indiana, Kentucky, Massachusetts, Nevada, New York,

II
The Right of Publicity Going Beyond Traditional Notions of Name and Likeness

The United States Court of Appeals for the Second Circuit decision in *Haelan* created the right of publicity doctrine, which focused on an individual's right to protect his name and likeness—indeed, "name or likeness" are the very terms used by Prosser.[32] As the doctrine has developed, however, the attributes possessed by an individual that are protected by the right of publicity have expanded beyond just names and photographs. As a general proposition, protection has been granted with regard to "representations which are recognizable as likenesses of the complaining individual,"[33] with identifiability of the individual being the key fact to determine.

Clearly, a photograph of a celebrity may fit this description, just as the blatant use of a celebrity's name without permission would also constitute a violation if used for commercial purposes.[34] While the *Ali* case demonstrated that the right of publicity cause of action can be sustained without the explicit use of one's name or face, cases decided before and after *Ali* suggest that the scope of the publicity right goes even further. The extension of the rule makes it entirely plausible that marketing a college jersey with the same number a star player wears for each game is a use of the player's identity that falls under the right of publicity rubric. The following cases, listed chronologically, illustrate the growth of the doctrine.

A. *Motschenbacher v. R.J. Reynolds Tobacco Co.*[35]

As was the case in *Ali*, the facts in *Motschenbacher* did not reveal that the defendant used the plaintiff's actual name or picture in association with its alleged violation of the right of publicity. The plaintiff in *Motschenbacher*, a famous race-car driver, sought relief

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Oklahoma, Rhode Island, Tennessee, Texas, Utah, and Wisconsin. Derek C. Crownover, *Minor League Rights of Publicity Are Major League*, 2 SPORTS L.J. 227, 231 n.11 (1995).

32. Prosser, *supra* note 8, at 389.

33. Ali v. Playgirl, Inc., 447 F. Supp. 723, 726 (S.D.N.Y. 1978)(holding portrait of nude man seated in the corner of boxing ring recognizable as former heavyweight champion Muhammad Ali, without using Ali's name or showing his face); *cf.* Margolies, *supra* note 31, at 372 ("A plaintiff will only have a cause of action if he or she can be recognized from the purported likeness").

34. *See* James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 652-53 (1973).

35. 498 F.2d 821 (9th Cir. 1974).

when the defendant used his race car in a television commercial for cigarettes.[36]

The Court of Appeals for the Ninth Circuit overturned a lower court's grant of summary judgment, holding that Motschenbacher could sustain a cause of action.[37] The court rejected the district court's rationale for granting R.J. Reynolds' summary judgment motion, which was that the plaintiff's name or photograph was not used in the advertisement.[38] The actual likeness of the plaintiff did not have to be present in the advertisement: it was enough that an endorsement might be inferred by those who recognized the peculiar markings of his car.[39] Since an endorsement by the plaintiff might be inferred from the advertisement, the use of the distinctly marked car without the plaintiff's permission could violate his right of publicity.[40] Despite agreeing with the district court that the plaintiff's *likeness* was unrecognizable in the advertisement, the court of appeals stressed that "the [lower] court's further conclusion of law to the effect that the driver is not identifiable as plaintiff is erroneous in that it wholly fails to attribute proper significance to the distinctive decorations appearing on the car."[41] The distinctive car was an extension of Motschenbacher's identity.[42] By using the well-known car in its advertisement without the plaintiff's permission, the defendant had reaped what it did not sow; it obtained an endorsement, a commercial value, from Motschenbacher without receiving consent or giving compensation.

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36. *Id.* at 822.

37. *Id.* at 822, 825-26.

38. The district court found that the person driving the car in the advertisement "is unrecognizable and unidentified" and that "a reasonable inference could not be drawn that he is, or could reasonably be understood to be plaintiff . . . ." *Id.* at 822-23.

39. *Id.* at 827. *See also* MCCARTHY, *supra* note 10 at § 4.15[C] (in *Motschenbacher*, the focus was not on the car, but on the object "as a means of identifying [the] plaintiff.").

40. Because *Motschenbacher* recognized a cause of action, it effectively extended the concept of "identity" beyond the person. The extension of this to Motschenbacher's race car made this, to some, "the most radical extension of protection" given by right of publicity law. *See* Hetherington, *supra* note 30, at 10; *see also* MCCARTHY, *supra* note 10, at § 4.15[C] ("Objects closely related to a person").

41. *Motschenbacher*, 498 F.2d at 827.

42. The court noted that the markings on the car pictured in the advertisement "were not only peculiar to the plaintiff's cars but they caused some persons to think the car in question was plaintiff's and to infer that the person driving the car was the plaintiff." *Id.* (footnote omitted).

B. *Hirsch v. S.C. Johnson & Son, Inc.*[43]

Elroy "Crazylegs" Hirsch was a football star of national prominence with the University of Wisconsin, the University of Michigan, and professionally with the National Football League's Los Angeles Rams.[44] During his collegiate football career, "Hirsch's unique running style, which looked something like a whirling eggbeater," earned him the nickname "Crazylegs."[45] In this case, Hirsch sought damages for the unauthorized use of the nickname by the defendant, which had associated the name "Crazylegs" with a shaving gel for women.[46]

The Wisconsin Supreme Court recognized a common law cause of action for violation of a person's right of publicity.[47] In doing so, the court analyzed and accepted the misappropriation of identity tort identified by Dean Prosser in *Privacy*, while also setting it apart as separate and distinct from causes of action based on the right to privacy.[48] The court also noted the public policy considerations behind its ruling. Foremost among these reasons is the protection of the publicity value in one's name to prevent the unjust enrichment of those who appropriate this value without a license or consent.[49]

The court sustained a cause of action for Hirsch, despite the fact that the plaintiff's actual name was not used in the defendant's advertisement. The court reasoned that "[a]ll that is required is that the name clearly identify the wronged person. In the instant case, it is not disputed at this juncture of the case that the nickname identified the plaintiff Hirsch."[50] The court went on to note that the name "Crazylegs" could potentially meet the requirement of clearly identifying Elroy Hirsch: such a determination was a question of fact for the jury.[51]

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43. 280 N.W.2d 129 (Wis. 1979).

44. *Id.* at 131.

45. *Id.*

46. *Id.* at 130.

47. *Id.* at 134.

48. *Id.* at 133-34. The Wisconsin Supreme Court analyzed the ideas of Prosser, Nimmer, and the opinion by Judge Frank in *Haelan Laboratories* to "stress the significant distinction between the tort of appropriation and other torts involving invasion of privacy." *Id.* at 134.

49. *Id.*

50. *Id.* at 137.

51. *Id.* at 138. *See also* Prosser, *supra* note 8, at 404 (explaining a fictitious name may be so connected with an individual as to protect it against unauthorized commercial use).

C. *Carson v. Here's Johnny Portable Toilets, Inc.*[52]

The *Carson* case provides another example of how far the law of publicity has gone in defining what forms of "identity" are appropriately protected. Johnny Carson, the former host of *The Tonight Show*, brought suit against the defendant based on the latter's use of the famed Carson monologue introduction cue of "Here's Johnny."[53] A federal district court dismissed Carson's complaint, holding that the right of publicity "extend[s] only to a 'name or likeness,' and 'Here's Johnny' did not qualify."[54]

The Court of Appeals of the Sixth Circuit dismissed the lower court's reading of the right of publicity doctrine as "too narrow," arguing that "[i]f the celebrity's *identity* is commercially exploited, there has been an invasion of his right whether or not his 'name or likeness' is used. Carson's identity may be exploited even if his name, John W. Carson, or his picture is not used."[55] Citing *Motschenbacher*, *Ali*, and *Hirsch*, the court accepted "Here's Johnny" as an identifying characteristic of Johnny Carson, despite the obvious fact that his name was not explicitly used.[56] In recognizing the defendant's actions as misappropriation of identity, the court of appeals recognized the view that a celebrity's identity could be appropriated in various ways, beyond the use of name or likeness.[57] The famous introduction of "Here's Johnny" was considered to be one of those ways.[58]

Following the Sixth Circuit's decision in *Carson*, it is evident that right of publicity law had come a long way from its beginnings in *Haelan Laboratories*. From "names and likenesses" being the operative terms, courts developed the doctrine to include aspects of

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52. 698 F.2d 831 (6th Cir. 1983).

53. *Id.* at 833.

54. *Id.*

55. *Id.* at 835 (emphasis added).

56. *Id.* at 835-36.

57. "It is our view that, under the existing authorities, a celebrity's legal right of publicity is invaded whenever his identity is intentionally appropriated for commercial purposes . . . . It is not fatal to appellant's claim that appellee did not use his 'name.'" *Id.* at 837. The court pointed out that using the plaintiff's real name in another form, such as "J. William Carson Portable Toilet," would not have violated his right of publicity. "The reason is that, though literally using appellant's 'name,' the appellee would not have appropriated Carson's identity as a celebrity. Here there was an appropriation of Carson's identity without using his 'name.'" *Id.*

58. *But see id.* (Kennedy, J., dissenting): "The majority's extension of the right of publicity to include phrases or other things which are merely associated with the individual permits a popular entertainer or public figure, by associating himself or herself with a common phrase, to remove those words from the public domain."

identity which included nicknames, performances, or even distinctive voices.[59] In a subsequent decision that spawned much critical commentary, the Ninth Circuit Court of Appeals developed the doctrine in a more far-reaching fashion.

D. *White v. Samsung Electronics America*[60]

The *White* case probably displays the broadest scope to which right of publicity law has developed in recognizing aspects of a person's identity beyond name and likeness. This case arose out of the defendant's advertising campaign, which was designed to depict certain contemporary personalities or features of mainstream culture and how they would be in the 21st century. The advertisements were humorous in nature, since they were based on "hypothesizing outrageous future outcomes for the cultural items . . . ."[61]

The plaintiff in this case was Vanna White, the celebrity letter-turner from television's *Wheel of Fortune* game show.[62] White brought suit based on one of the humorous effects created by the advertisements. The advertisement in question depicted a robot, dressed similarly to the way White dresses on the show, standing next to a game board that was identifiable as the *Wheel of Fortune* stage set.[63] White, unlike other personalities depicted in the advertising campaign, did not consent to the ads and was not paid for them.[64]

The Ninth Circuit Court of Appeals overturned the lower court's grant of summary judgment in favor of the defendant, holding that White had alleged enough to sustain a cause of action.[65] In so holding,

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59. *See* Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988). In that case, establishing a right of publicity beyond one's name and likeness, the Ninth Circuit Court of Appeals extended the definition of "identity" to include one's "distinctive voice." *Id.* at 463.

In *Midler*, the defendant hired one of Bette Midler's backup singers to sing on its advertisement, and sound as much like Midler as possible. Midler sued on a right of publicity theory, basing her claim on Ford's unauthorized use of a sound-alike. The Ninth Circuit held in favor of Midler, finding that there existed rights in a "distinctive voice . . . deliberately imitated in order to sell a product . . . ." *Id.*

The *Midler* case served as yet another step in the development of the right of publicity doctrine, marking a "final shift toward the evolving pattern of protecting all incidents of a person's identity against wrongful commercial appropriation." Hetherington, *supra* note 30, at 12. The subsequent Vanna White case showed that this was not yet a final shift.

60. 971 F.2d 1395 (9th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993).

61. *Id.* at 1396.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 1397, 1399.

the court continued the theme it had set forth in the *Midler* case.[66] While pointing out that the robot in the *White* case "did not make use of White's name or likeness," the court reiterated that "the common law right of publicity is not so confined."[67] The court also noted that right of publicity law "has borne out [Prosser's] insight that the right of publicity is not limited to the appropriation of name or likeness."[68] After analyzing the evolution of the doctrine by examining the *Motschenbacher*, *Midler*, and *Carson* cases, the court explained that "[t]hese cases teach not only that the common law right of publicity reaches means of appropriation other than name or likeness, but that the specific means of appropriation are relevant *only for determining whether the defendant has in fact appropriated the plaintiff's identity*."[69]

Based on this formulation, the court of appeals decided that there was "little doubt about the celebrity the ad is meant to depict."[70] The means the defendant used to capitalize on the identity—a robot in the *White* case—were of no consequence. Also significant in this case was that the court of appeals allowed White to have a cause of action even though the advertisement arguably appropriated an aspect of the show itself, and not her persona. In effect, appropriation of her persona in the show was synonymous with the appropriation of her identity, because it capitalized on her celebrity status as Vanna White.[71]

66. *Id.* at 1398.

67. *Id.* at 1397.

68. *Id.* at 1398.

69. *Id.* (emphasis added).

70. *Id.* at 1399.

71. The decision was met by much criticism. A vigorous dissent from an order denying rehearing called this a "classic case of overprotection." White v. Samsung Elecs. Am., 989 F.2d 1512, 1514 (9th Cir. 1992)(petition for rehearing)(Kozinski, J., dissenting). The dissent argued that the majority opinion granted to White a right of publicity in "anything that reminds the viewer of her." *Id.* at 1515 (emphasis omitted). The dissent also surmised that if the ad in question had not been associated with the Wheel of Fortune game show stage, no one would have associated it with White. Thus, the court was "giving White an exclusive right not in what she looks like or who she is, but in what she does for a living." *Id.* (footnote omitted).

Judge Kozinski's criticisms are thoughtful and well-founded. However, for the purposes of this Note, they do not apply with equal force in the context of replica college jerseys. Selling uniform jerseys with a player's distinctive number on them is a marketing of the player's identity as an athlete. This is more in line with taking advantage of an individual's identity. While the robot in the Samsung ad would remind one of Vanna White only when viewed in conjunction with the Wheel of Fortune stage (accepting Judge Kozinski's argument), a replica jersey reminds people of the athlete no matter what the context.

III
Effect of Right of Publicity Law Applied to College Sports Merchandise

The development of the case law, whether by interpreting state statutes or the common law, has moved right of publicity law away from the confines of protecting simply an individual's name and likeness from unauthorized commercial appropriation. Whether someone is named or pictured explicitly is no longer of consequence. As all of the above cases show, there are viable causes of action under the right of publicity where a celebrity's name or picture is nowhere to be found.

Instead of name and likeness, it is evident that an individual's "identity" is the interest to be protected from commercial appropriation. If someone is identifiable in a particular commercial use, then there will be liability for a right of publicity violation.[72]

A. The Jersey as an Athlete's "Identity"

It is not an extraordinary stretch of this doctrine to make it applicable to the marketing of college jerseys and T-shirts that depict a particular player's uniform number.[73] An athlete's uniform number is ostensibly associated with him. Players are identified on the field by virtue of their uniform numbers. Great players, college and professional, are often honored by having their uniform numbers retired—a symbolic gesture providing that no other player will ever wear a particular number again, forever associating a particular player from a specific team with a particular uniform number.[74] Whether college or professional, the athlete's celebrity status, which makes up his publicity value, springs from his persona as an athlete. A jersey that a player wears each time he plays, with a distinctive number by

72. *See* White v. Samsung Elecs. Am., 971 F.2d 1395,1398 (9th Cir. 1988), *cert. denied*, 508 U.S. 951 (1993); Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 827 (9th Cir. 1974)(all cases emphasizing characteristics that are connected with a plaintiff's "identity").

73. It should be pointed out that this Note does not wish to apply the doctrine to simply *any* type of merchandise sold or licensed by a college or university. It is only that merchandise which directly capitalizes on an individual athlete's persona that is questioned. Replica uniform jerseys fit the latter, while a T-shirt bearing only a college's logo would not.

74. *See, e.g.*, SAN FRANCISCO GIANTS, 1994 SAN FRANCISCO GIANTS INFORMATION GUIDE 68 (1994)(listing the uniform numbers retired by this major league baseball team. These numbers, along with the players' names, are emblazoned on the outfield fence at San Francisco's Candlestick Park, the Giants' home stadium).

which he is readily recognizable, is a part of that persona. This is particularly true in light of the fact that college sports, particularly basketball and football, are televised nationally on a regular basis. The uniform is an extension of the student-athlete's identity and would seem to fit the description of a "general element[] of an individual's persona which identif[ies] that person."[75] With this kind of a product, the college athlete's identity has "merged" with the product, just as when a T-shirt bears the actual likeness of a celebrity.[76] While it may be true that a purchaser of a college jersey may buy the item because of identification with the school, it is equally possible, and extremely likely, that the consumer is also buying the athlete's celebrity persona as it is perceived.[77]

The problem with today's marketing of college jerseys is that it blatantly takes advantage of a player's "star value" and recognizability to the public. This is made clear by the reality that only certain jersey numbers from certain schools are marketed.[78] This is by design; the colleges and their licensees want to take advantage of the popularity of well-known players.[79] Even if this particular commercial exploitation is not done in as blatant a manner as using actual photographs,[80] it is an exploitation nevertheless. Under the way right of publicity case law has developed, the question is not the means used to appropriate an individual's identity. What matters is whether that

75. Margolies, *supra* note 31, at 364-65.

76. *See* Hetherington, *supra* note 30, at 33.

77. *Id.* at 34.

78. *See, e.g.*, THE SPORTING NEWS, 1995 COLLEGE FOOTBALL YEARBOOK 11 (1995). The description of the replica jersey notes that most NCAA teams are available, with the jersey sporting a "popular player's number on front and back." *Id.*

79. *See, e.g.*, SPORTS ILLUSTRATED, Mar. 11, 1996, at 59 (advertisement for officially licensed college basketball merchandise). The ad features a "replica game jersey" for sale, with 21 schools available. *Id.* A chart lists the uniform numbers that appear on the jerseys, most of them of current players at that time. *Id.* Among the jerseys available: Arizona #44 (Reggie Geary), California #24 (Tremaine Fowlkes), Connecticut #34 (Ray Allen), Georgetown #3 (Allen Iverson), Kansas #11 (Jacque Vaughn), Maryland #4 (Exree Hipp), Massachusetts #21 (Marcus Camby), St. John's #13 (Felipe Lopez), Syracuse #44 (John Wallace), Villanova #30 (Kerry Kittles), and Wake Forest #21 (Tim Duncan).

80. *See* James S. Thompson, Comment, *University Trading Cards: Do College Athletes Enjoy a Common Law Right to Publicity?*, 4 SETON HALL J. SPORT L. 143, 175-76 (1994)(arguing sale of trading cards featuring college athletes' photographs is clear violation of the common law right of publicity).

identity has been appropriated at all.[81] The marketing of these college jerseys is such an appropriation.[82]

B. Policy Reasons Favoring the Athlete

The policy behind right of publicity law is challenged by allowing the unbridled marketing of this type of merchandise. The student-athletes are in the unique position of not being able to fully control their own rights of publicity. Currently, universities control the use of the players' likenesses and enjoy the financial benefits of this control.[83] NCAA rules limiting the compensation that may be given to student-athletes mean that the athletes whose publicity value has been used do not reap any direct financial benefit from the use. Thus, the universities profit without having to pay the athletes who are responsible for certain merchandise being profitable.

One goal of the right of publicity doctrine is to prevent this sort of unjust enrichment, which is attained by "[u]sing another's identity without permission to promote the sale of one's own goods or services . . . ."[84] The rationale is that this unjust enrichment is a "theft of goodwill. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which [the defendant] would normally pay."[85] In the context of college athletics, the case for unjust enrichment may even be stronger. Revenues for college merchandise have grown considerably over the past decade[86] without the athletes getting any direct benefit. This is true despite the reality that college athletics are a big business where star athletes enable a college to reap great financial rewards.[87]

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81. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992).

82. In *White*, the Ninth Circuit reasoned that it was impossible to delineate specifically all of the methods by which identity can be appropriated: "[a] rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth." *Id.*

83. *See* Thompson, *supra* note 80, at 166. The universities are the only ones who may retain such control, however. "The NCAA has specifically made it impermissible for outside profit-seeking entities to use the likenesses of college athletes to sell their commercial products." *Id.* at 168 (citation omitted). *See also* Angelo Bruscas, *Final Four Should Lift Merchandisers Out of Sports Slump*, SEATTLE POST-INTELLIGENCER, Nov. 14, 1994, at D8 (NCAA regulations prohibit poster manufacturer from depicting the image of any specific player).

84. MCCARTHY, *supra* note 10, at § 2.1(A).

85. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977).

86. *See* Hiestand, *supra* note 1.

87. *See* Matthew J. Mitten, *University Price Competition for Elite Students and Athletes: Illusions and Realities*, 36 S. TEX L. REV. 59, 60 (1995)(arguing an "elite athlete may

Concededly, the colleges and universities which maintain major athletic programs generate a multitude of revenues apart from sales of merchandise.[88] Student-athletes do not gain direct benefit from these revenues either. There is something inherently unjust, however, in allowing universities to reap the total benefit of something that is so closely connected with the student-athlete's identity and persona. After all, the athlete has made a "unique contribution" toward making a jersey with a particular number marketable to the fans of the sport.[89] Taking advantage of this unique contribution of identity by the student-athlete seems to fly in the face of a major policy behind the publicity right: to prevent the unjust enrichment of parties "reaping what others have sown."[90]

IV
Solutions to the Problem of Unjustly Marketing Players' Identities

It seems fairly evident that a degree of exploitation of the college athlete takes place through the marketing of certain merchandise clearly identifying the player as well as the school. The developing right of publicity doctrine tends to establish that this exploitation violates the players' otherwise existing rights to appropriate their identity. There are three possible courses to take in attempting to make sure the student-athlete's rights are protected and that he may reap the rewards of the stardom he has achieved as a collegiate athlete. First, the NCAA and the courts could recognize the publicity rights of players and allow them to sustain causes of action against their schools for misappropriation. Second, the NCAA could change its policy and allow payments to the athletes based on the merchandising revenue. Finally, the NCAA could mandate a special trust fund for the athletes, in which certain merchandising revenue can

singlehandedly enable a university to generate increased revenues by playing a sport for the school.").

88. For example, college football bowl games and the NCAA basketball tournament generate gross receipts of millions of dollars as well as payouts to the participating schools. *See* Goldman, *supra* note 6, at 206. A college athletic program can also draw revenue from a variety of other sources, including alumni contributions generated by pride in the school's success on the playing field. *Id.* Television rights can be a huge revenue source also. The NCAA, for example, sold the rights to its mens basketball tournament for $1 billion. *See* Ray Yasser, *A Comprehensive Blueprint for the Reform of Intercollegiate Athletics*, 3 MARQ. SPORTS L.J. 123, 156 (1993).

89. *See* Hetherington, *supra* note 30, at 34.

90. Spahn, *supra* note 16, at 1029.

go to the benefit of the student-athletes. This last solution could ensure that an athlete reaps some reward from the marketing of merchandise that utilizes his notoriety. None of the proposed solutions, however, can be fully analyzed without first examining the NCAA and its role in governing intercollegiate athletics.

A. History of the NCAA

The NCAA's beginnings can be traced to 1905, when a number of universities formed the Intercollegiate Athletic Association of the United States (IAAUS) to address the problems of violence in college football.[91] This organization, which some credit with saving college football, later changed its name to the NCAA.[92]

Besides reforming college football, the NCAA's early years were devoted to incorporating amateurism into intercollegiate athletics.[93] Prior to these efforts by the NCAA, "professionalism" was rampant in college athletics.[94] These efforts to make amateurism part of the definition of college athletics eventually became successful,[95] and the NCAA has now become "the largest sports organization to prohibit member athletes from receiving compensation."[96]

As it exists today, the NCAA's membership consists of approximately 960 four-year colleges and universities in the United States.[97] The individual member institutions continue to exercise control over their own athletic programs, but they are required to

91. *See* Christopher L. Chin, Comment, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1215 (1993); *see also* Charles Farrell, *Historical Overview*, *in* THE RULES OF THE GAME: ETHICS IN COLLEGE SPORT 3, 7 (Richard E. Lapchick & John B. Slaughter eds., 1989)[hereinafter THE RULES OF THE GAME].

92. Chin, *supra* note 91, at 1215.

93. The NCAA defines an amateur athlete as "'one who engages in a particular sport for the educational, physical, mental, and social benefits derived therefrom and to whom participation in that sport is an avocation.'" Allen Sack, *Recruiting: Are Improper Benefits Really Improper?*, *in* THE RULES OF THE GAME, *supra* note 91, at 71, 74.

94. "Amateurism, at least as historically conceived, was largely absent from college sports in the beginning of the twentieth century. Competition for cash and prizes . . . as well as the payment of athletes and hiring of professional coaches had invaded the arena of intercollegiate athletics." Kenneth L. Shropshire, *Legislation for the Glory of Sport: Amateurism and Compensation*, 1 SETON HALL J. SPORT L. 7, 14 (1991).

95. "As the monetary resources of the NCAA grew, so too did its enforcement power. The prime targets of those enhanced enforcement powers were the principles of amateurism as incorporated into the NCAA constitution." *Id.* at 16.

96. *Id.* at 16-17.

97. Chin, *supra* note 91, at 1215.

comply with the rules and dictates of the NCAA.[98] With this ultimate power to oversee college sports, the NCAA's role is essentially one of "dominance over most aspects of intercollegiate athletics."[99]

Many of the rules promulgated by the NCAA center on the concept of amateurism. Indeed, "[t]he NCAA openly states that one of its primary purposes is to promote the concept of amateurism."[100] Since the primary difference between amateur and professional athletics is that professional athletes are paid salaries, the focus on amateurism dictates that "[t]he lack of compensation for the student participant permeates virtually all decisions in collegiate athletics today."[101] It is with this background that we must begin to examine NCAA policy as it relates to possible solutions to the problems associated with the marketing of the student-athlete.

B. Allowing a Cause of Action for Right of Publicity Violation

Allowing the student-athlete to make a right of publicity claim would break new ground because such a right for college athletes "has never been established."[102] As illustrated above, through the examination of the case law, a cause of action may be viable. Remedies here would include injunctive relief or damages.[103]

If a right of publicity violation is established, an injunction would enable the athlete to stop the school from marketing the offending merchandise.[104] Another option is damages, which would usually be in the amount equal to the commercial value of the identity that was misappropriated by a defendant.[105] This could be evaluated by looking at the amount of benefit that the defendant has received from the unauthorized use.[106]

There are potential obstacles that arise in trying to implement this solution. First, the NCAA's limited compensation rules could stand in

98. Non-compliance with NCAA regulations subjects a member institution to discipline under the rules. *Id.* at 1215-16.

99. THE RULES OF THE GAME, *supra* note 91, at 7.

100. Yasser, *supra* note 88, at 126.

101. Shropshire, *supra* note 94, at 16; *see also* Chin, *supra* note 91, at 1216.

102. Thompson, *supra* note 80, at 156.

103. *See generally* MCCARTHY, *supra* note 10, at §§ 11.6, 11.7; Margolies, *supra* note 31, at 367-68.

104. *See* Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254 (N.Y. Sup. Ct. 1984)(plaintiff has absolute right to injunction when right of publicity violation has been established).

105. MCCARTHY, *supra* note 10, at § 11.8.

106. Margolies, *supra* note 31, at 367-68.

the way—damages in this area could be construed as compensation for the university's marketing of the identity-bearing merchandise.[107] Applying such a restriction in this context would be untenable. The money a student-athlete would receive for winning a right of publicity claim is not direct compensation. Rather, it is damages for a tort committed against the individual by a defendant. To block one's receipt of tort damages based on NCAA regulations is an unfair proposition.[108]

The second obstacle stands on firmer ground, but would also be unjust if applied to the student-athlete. Part of the crux of a right of publicity claim is that a plaintiff has not consented to the alleged misappropriation of his identity by the defendant.[109] An argument can be made that the student-athlete has impliedly consented to the actions his university has taken with respect to marketing jerseys and T-shirts. This idea of implied consent flows from the fact that "[c]ollege athletes, by participating in intercollegiate athletics, agree to abide by all NCAA regulations and bylaws, including those which permit universities to use the likenesses of college athletes" for commercial purposes.[110]

It would be highly unfair to make this sort of implied consent binding on the student-athlete, when an athlete must sign this agreement in order to participate at the intercollegiate level.[111] However, this would be a very real obstacle to the sustaining of a cause of action.

C. Compensation to the Student-Athlete

As previously noted, the NCAA rules generally limit student-athlete compensation to tuition, room, board, and books.[112] The effect

107. *See* Thompson, *supra* note 80, at 173.

108. However, just such a thing has happened before. Former University of Nebraska football player Jarvis Redwine, who played for the school in the 1980's, received an injunction that prohibited pirateers from selling merchandise bearing his likeness. An injunction was all Redwine received, however. "NCAA rules prohibited Redwine from recovering any award constituting the value obtained from the use of his likeness and image." Shropshire, *supra* note 94, at 26 n.102.

109. Prosser, *supra* note 8, at 419 (consent as a chief defense to any of the privacy torts).

110. Thompson, *supra* note 80, at 176 (citation omitted).

111. NCAA OPERATING BYLAWS, art. 12.1, reprinted in NCAA, 1993-94 NCAA MANUAL (Laura E. Bollig ed., Mar. 1993). In order to retain amateur status and eligibility to compete in intercollegiate sports, an athlete must comply with all the NCAA regulations. *Id.* If an athlete refuses to comply with NCAA rules, he or she is ineligible for competition. *Id.* at 12.1.1.

112. Goldman, *supra* note 6, at 210.

of this is that, despite the substantial amount of money generated by college athletics, the student-athletes are denied a fair share of the revenue they help to create.[113]

Some commentators have argued that the NCAA regulations limiting compensation violate antitrust laws.[114] It has also been advanced that "[i]t is inequitable that student-athletes, who generate millions of dollars for the university, must scrounge for basic expenses and struggle through their classes."[115] Despite this inequity, courts have legitimized certain NCAA rules, particularly those dealing with limited compensation to the student-athlete.[116]

For example, in *NCAA v. Board of Regents of the University of Oklahoma*,[117] the Supreme Court put forth substantial dicta illustrating the need for the NCAA to maintain a certain degree of control over its member institutions and the student-athletes. In *Board of Regents*, the University of Oklahoma and the University of Georgia challenged the NCAA's agreements with two major broadcast networks that set forth the guidelines for televising college football games.[118]

The Supreme Court invalidated the NCAA's television plan and sustained the antitrust challenge by the universities.[119] However, the Court recognized the unique status of the NCAA and its role in the preservation of intercollegiate amateur athletics.[120] The Court went on to acknowledge the unique nature of college athletics as an institution.

> The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than

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113. *See* Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1300 (1992)

114. *See, e.g., id*; Goldman, *supra* note 6, at 208; Chin, *supra* note 91, at 1244-45. However, no court has invalidated the limited compensation rules as a violation of antitrust laws. Mitten, *supra* note 87, at 60.

115. Goldman, *supra* note 6, at 207.

116. It must be emphasized that analyses of antitrust law and challenges to NCAA regulations based on antitrust principles are beyond the scope of this Note. Any reference to antitrust law is simply the result of antitrust being a popular ground on which to challenge NCAA regulations, particularly those which limit compensation to the student-athlete.

117. 468 U.S. 85 (1984).

118. The schools argued that the plans unlawfully restrained trade through the NCAA's methods of controlling televised games. This plan limited the number of televised football games and no member of the NCAA was "permitted to make any sale of television rights except in accordance with the basic plan." *Id.* at 94.

119. *Id.* at 120.

120. The Court noted that the college athletics industry is one where "horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 101.

> professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. To preserve the unique character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the 'product' cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.[121]

Through this analysis, the Court legitimized the NCAA and its role in the preservation of collegiate athletics and the amateurism that it purports to display.[122]

In a number of ways, however, the view of collegiate athletics as an institution of amateurism is misguided. Even though the players may be characterized as amateurs, the NCAA and its member universities are not engaged in amateurism. To look at major college sports in this way fails to acknowledge that "commercialism [is] the driving force in college athletics."[123] The revenue generated by this industry belies a characterization as "amateur."[124]

The marketing of merchandise is an obvious form of commercialism in college athletics. Universities take commercial advantage of the popularity of college athletics through the merchandising and licensing of college merchandise. Colleges and the NCAA "market[] products through various licensing schemes, while vigorously 'selling' the myth of the student-athlete to the consuming public."[125] The money generated by the colleges through capitalizing on the popularity of college sports substantially outweighs the benefits given to the athletes who are largely responsible for the revenue.[126]

The unfairness and hypocrisy of the failure to compensate the athletes for merchandise taking advantage of their special marketability is especially evident in light of the benefits that college

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121. *Id.* at 101-02.

122. Indeed, a stated goal of the NCAA is the pursuit and preservation of amateurism in intercollegiate athletics. *See, e.g.*, Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J. 269, 273 (1994).

123. *Id.* at 271. Davis argues that intercollegiate athletics have more of a commercial character than an amateur one.

124. "The NCAA estimates that sports revenues at Division IA schools exceed one billion dollars per year." *Sherman Act Invalidation of the NCAA Amateurism Rules*, *supra* note 113, at 1314.

125. Yasser, *supra* note 88, at 156.

126. "For example, in 1987, the University of Nebraska football program reportedly generated nearly $11 million in revenues, but distributed only $150,000 in scholarships to football players." Goldman, *supra* note 6, at 257. Five months after the first of its back-to-back national football championship titles in 1994, Nebraska had already made $2.18 million from licensing fees just on souvenir merchandise from that season. *Sports Briefing*, *supra* note 4.

coaches reap from endorsements.[127] Coaches earn hundreds of thousands of dollars from shoe contracts and other endorsement opportunities springing from their connection with college athletics.[128]

Paying college athletes is a controversial issue and one on which there is no consensus. However, the notion of amateurism is not an adequate justification for depriving student-athletes of some share of the monies generated by their own unique personas and talent. College merchandise, such as replica jerseys, depend on the celebrity of student-athletes for marketability.[129]

D. Trust Funds for the Student-Athlete

To satisfy those wary of outright payments made to the student-athlete, the NCAA might take its cue from the International Olympic Committee (IOC). Under the IOC regulations, amateur athletes are still allowed monetary compensation. Monies such as endorsement fees are collected and entered into a trust fund, from which the athlete's expenses are paid.[130] The money can be withdrawn after the athlete's career is over.[131] In the United States, The Athletics Congress (TAC) similarly regulates American track and field athletes.[132]

Appearance fees to the athletes, living and training grants, as well as endorsement revenues,[133] are funneled to trust funds set up by TAC.[134] The athletes can withdraw from this fund in specific instances set forth by TAC.[135]

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127. *See* Shropshire, *supra* note 94, at 26.

128. *Id.*

129. A recent example shows how strictly the NCAA enforces its amateurism rules. After discovering a World Wide Web page created by Northwestern University basketball player Dan Kreft, *Sports Illustrated* approached Kreft about contributing a story to the magazine. *See* Alexander Wolff, *Abandoned in Cyberspace*, SPORTS ILLUSTRATED, Mar. 4, 1996, at 92. The NCAA balked at allowing Kreft to write for the magazine, even if for free. "Invoking Article 12.5.2.1 of their constitution, [the NCAA] ruled that . . . Kreft . . . would be helping a commercial entity, *i.e.* SI, sell its product—and that would constitute unacceptable exploitation of his status as an athlete." *Id.* Wolff noted the hypocrisy in the NCAA denying Kreft's opportunity in the name of preventing exploitation, while "allow[ing] $59.99 UConn jerseys bearing Ray Allen's number to hang in sporting goods stores . . . ." *Id.* Ray Allen was the top men's basketball player at the University of Connecticut in 1996.

130. Sack, *supra* note 93, at 82.

131. *Id.*

132. Shropshire, *supra* note 94, at 18.

133. Even prize money, in some instances, is allowed to be collected, as long as it is put into the trust funds and administered by the appropriate governing body. Sack, *supra* note 93, at 82.

134. Shropshire, *supra* note 94, at 18.

135. *Id.* "Included are the costs associated with training and competition, health care and agents' commissions." *Id.*

Should the NCAA hold steadfastly to its notions of amateurism and resist payment to the athletes, the trust fund alternative could be a fair and reasonable compromise. First of all, it could be limited to certain merchandising monies, such as those associated with selling game jerseys or any other revenue from marketing a student-athlete's name and likeness.[136] Secondly, a trust-fund system would be fair. Trust funds would give the student-athlete who has achieved celebrity status an opportunity to be compensated for what he has earned in that capacity.[137] Finally, this option does not compromise the NCAA's stated goal of preserving amateurism. Because the IOC has adopted a trust fund system, "a similar NCAA plan would be considered within the boundaries of 'amateurism.'"[138] By realizing that even the most sacred of "amateur institutions"—the Olympics—has recognized compensation to the athletes in this form, intercollegiate athletics could follow suit without compromising its goal of preserving amateurism.[139] At the same time, this solution would fairly "acknowledge the commercial nature of intercollegiate athletics, and recognize that student-athletes are valuable contributors to its success."[140]

Another advantage of this solution is that it can help protect the student-athlete's interests.[141] TAC delineates certain instances where amateur track athletes can draw from the trust fund; the NCAA and its member institutions can create similar regulations. Hopefully, the regulations would be designed to benefit the student-athlete, to ensure that the athlete has the money needed to supplement the direct costs

136. It should again be emphasized that this solution is proposed only with respect to the merchandising revenue attained through the sale of replica game jerseys, or any related items which would tend to violate a student-athlete's right of publicity. Evaluating the wisdom of using trust funds as a source of general compensation to the student-athlete, in lieu of salaries and as an alternative to the current limited compensation rules, is beyond the scope of this note. *See generally* Chin, *supra*, note 86, at 1249-50; Sack, *supra* note 93, at 81-82 (proposing trust funds as possible financial reform to increase share of revenue to student-athlete).

137. *See* Chin, *supra* note 91, at 1250.

138. *Id.*

139. Arguably, this still would not be pure amateurism. *See generally* Davis, *supra* note 122, at 271 ("amateur-education" model of college athletics is "premised on illusory assumptions which fail to acknowledge commercialism as the driving force in college athletics."). Nevertheless, the current state of college athletics is not pure amateurism either. *See id.* at 274.

140. Chin, *supra* note 91, at 1250.

141. This is extremely important in maintaining the "moral legitimacy" of college sports. *See* Sack, *supra* note 93, at 81-82. "Efforts to show that some of [the] revenue comes back to athletes, especially if it is in the form of educational benefits, would be a clear statement to athletes and the public at large that college sport has the interests of the student-athletes uppermost in mind." *Id.* at 81.

of education. Similarly, after his college career is over, the athlete could be allowed to withdraw the money. If the athlete does not go on to a prosperous professional career, he has still been justly allowed to reap his own rewards from his publicity value as a college athlete.[142]

V
Conclusion

The NCAA and its member colleges and universities bring in substantial revenue through the commercialization of college athletics. The marketing of college jerseys and T-shirts depicting the uniform numbers of well-known student-athletes creates a unique problem. This kind of merchandising takes advantage of the publicity value earned by the athlete through his or her popularity and outstanding performance on the playing field.

This marketing is a violation of the athlete's right of publicity. Normally, an individual would be entitled to compensation for this kind of appropriation. However, college athletes under the current system cannot reap these benefits, even though they are uniquely responsible for them. Allowing athletes to invoke their publicity rights would be in harmony with the policy considerations behind right of publicity law. A fairer solution would be to allow compensation to the student-athlete either by direct payment for this merchandise, or by a trust fund which would allow the athlete to be compensated, while still allowing the NCAA to achieve its goals of promoting amateurism. The trust fund solution is probably the best compromise between the need to fairly compensate the athletes who give value to this kind of merchandise, and the desire of the NCAA to preserve some semblance of amateurism in intercollegiate athletics.

142. This trust fund option has not gone unnoticed by the NCAA. At a meeting of college athletic directors in June, 1996, NCAA executive director Cedric Dempsey suggested that the NCAA explore the possibility of compensating student athletes, perhaps by "allowing the athletes to accept money from a trust fund that would be tied to their share of endorsement monies." *Hopeful Signs in the NCAA*, SPORTS ILLUSTRATED, June 24, 1996, at 22. While Dempsey backed off from the idea, he indicated a general willingness to address the inequities in college athletics. *Id.* at 23.